

REPORT OF THE ADJUDICATOR

Complaint reference number:	11033
WASPA member(s):	Sprint Media S.L. (the Information Provider or "IP") and Mira Networks (the Service Provider or "SP")
Membership number(s):	1168 and 0011
Complainant:	Public
Type of complaint:	Subscription service
Date complaint was lodged:	2010-10-27
Date of the alleged offence:	2010-08-04 until 2010-11-01
Relevant version of the Code:	9.0
Clauses considered:	11.4.1, 11.5.1, 11.5.2
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	Not applicable

Complaint

Complaint #11033 is the escalation of unsubscribe request #645702, logged on the WASPA unsubscribe system on 27 October 2010. The Complainant escalated the request to a formal complaint on the grounds that he did not subscribe to any service, and that he was dissatisfied with the outcome of the refund process, particularly because he has a "pay as you go" account and could not receive itemised billing.

The IP unsubscribed the Complainant on 1 November 2010 and stated that no refund was to be offered because all sign up and welcome messages were delivered. The formal complaint notification was sent to the IP and the SP on 4 November 2010. The IP as a WASPA Affiliate Member is bound by the Code, but the SP's infrastructure was being made use of to provide the service complained of, and the SP may accordingly also be treated as a respondent for the purposes of this complaint.

Information provider's response

In response to WASPA's request for logs in respect of the unsubscribe request, the IP provided the following:

DirectionDateTimeActionShort CodeMessage
 <<2010-08-04 15:42:14 OPTIN33533GOOGLE Code:4765
 IP Address: 168.172.1.2

This log seems to suggest that the IP's site (in particular an "opt-in" page) was accessed from a particular IP address on 4 August 2010 at 15h42.

On 5 November 2010, the IP wrote to WASPA to confirm that it had contacted the Complainant directly and had since resolved the complaint to his full satisfaction. WASPA forwarded this communication to the Complainant, who responded as follows on 24 November 2010:

"I am satisfied that my money has been returned. However, I would like to know how this could have happened. We hand Vodacom our money. They take it and hand it to someone else without confirming with us that this is in order. How many other people are being scammed this way and have to go through the trouble to try to recover losses. How many people are not compensated?"

The IP replied on 24 November 2010, offering an explanation as to how the Complainant subscribed to the service. It states as follows:

This is the way you subscribed to our service.

Our logs show that this number was subscribed to our Veage service where users can send as many text messages to as many people as they like, anywhere in the world.

On the 4th of August at 3:41pm, you might have been navigating the Internet and came across our Web: Google Landing page: <http://veage.com/SA/sms offer/> (See blue screen attached)

<<	<u>2010-08-04</u> <u>15:41:56</u>	<u>Web Registration</u>	<u>1/1</u>	<u>WebSite</u> <u>Veage</u>	Website Registration of 168.172.1.2 (ZA) on http://veage.com/SA/sms offer/
>>	<u>2010-08-04</u> <u>15:41:59</u>	<u>82383597</u> <u>Sent</u>	<u>1/1</u>	<u>33533</u> <u>Veage</u>	<u>Streaming</u> Congratulations! Enter your code 4765 on the Web or SMS the word: ACTIVATE to number 33533.
<<	<u>2010-08-04</u> <u>15:42:14</u>		<u>1/1</u>	<u>33533</u> <u>Veage</u>	GOOGLE Code:4765 IP Address: 168.172.1.2 Page: http://veage.com/SA/sms offer/ User Agent: Mozilla/4.0 (compatible; MSIE 8.0; Windows NT 5.1; Trident/4.0; .NET CLR 2.0.50727; .NET CLR 3.0.4506.2152; .NET CLR 3.5.30729)

Optin

This log suggests that the Complainant accessed the IP's landing page on 4 August 2010, and that by sending a text or entering a code, he opted in to the IP's service. The IP's response continues as follows:

In order for you to be able to send the text message, you must have agreed with the "Terms of use. by clicking in or "un-clicking" in the box below.

☐ I agree to the terms of use. Subscribe and get unlimited sms credits for R7/day. Sms any phone.

Send

Save now

Discard

My number:

Example: 0712345678

To:

Example: 0712345678 or international: +27712345678

Send

Characters left:

160

☐ I agree to the terms of use. Subscribe and get unlimited sms credits for R7/day. Sms any phone.

Terms of use: Veage subscription service cost only R7 per day and offers you unlimited SMS to any phone. To take advantage of this service you need to be 16 years or older and have the bill payers permission. To cancel this service, SMS stop to 33533 or contact support 0213002334 / support@veage.com. Send SMS via WEB (fixed internet) or WAP (mobile internet). We recommend WEB as WAP may be subject to additional data cost imposed by your network operator. Please contact your Network Operator for more information. This is an independent service operated by Sprint Media S.L and is not connected to any network operator, media group, search engine or affiliate in any way. We reserve the right to send you free promotional SMS relating to this and other services operated by Sprint Media S.L. For more information please see www.veage.com. General Terms and Conditions and Privacy Policy apply.

(Copied as appeared in the IP's response – letters at the end of each line of the terms of use were cut off in the IP's response).

The IP therefore alleges that the Complainant accepted its terms of use by clicking (or unclicking) in the box, before sending a message to opt in to the service.

The IP goes on to explain:

You can see at the bottom of the Veage landing page the following message:

Terms of use: Veage subscription service cost only R7 per day and offers you unlimited SMS to any phone. To take advantage of this service you need to be 16 years or older and have the bill payers permission. To cancel this service, SMS stop to 33533 or contact support 0213002334 / support@veage.com. Send SMS via WEB (fixed internet) or WAP (mobile internet). We recommend WEB as WAP may be subject to additional data cost imposed by your network operator. Please contact your Network Operator for more information. This is an independent service operated by Sprint Media S.L and is not connected to any network operator, media group, search engine or affiliate in any way. We reserve the right to send you free promotional SMS relating to this and other services operated by Sprint Media S.L. For more information please see www.veage.com. General Terms and Conditions and Privacy Policy apply.

The first word that appears is: " **Veage subscription service cost only R7....**"

You should read the small print before agreeing with the "terms of use" by clicking or "un-clicking" the box.

On the same day, 4th of August at 3:42pm, you received the following message: Enjoy unlimited SMS. No more expensive roaming charges www.veage.com password is: 77810. **SubscriptionR7/day. To stop, sms stop to 33533.** Support 086110647

At this point, you could have cancelled the subscription by texting the word **STOP**. This message was confirmed delivered.

>>	2010-08-04 15:42:35	82383662 Delivered	1/1 33533 Streaming Veage	Enjoy unlimited SMS. No more expensive roaming charges www.veage.com password is: 77810. SubscriptionR7/day. To stop, sms stop to 33533. Support 086110647.
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As you can see, the password for you in this case is 77810 to be able to access our web page and start sending unlimited messages or **STOP the service if you so wished.**

Subsequently, two monthly Reminder messages followed (27th of August and 25th of September) prompting you to **STOP** the service if you so wished. These messages were also confirmed "delivered".

>>	2010-08-27 21:26:20	84886337 Delivered	1/1 33533 Streaming Veage	Info: Send SMS from PC or cell phone www.veage.com and avoid expensive SMS charges. Password 77810. Subscription R7/day. Support 0861106472. stop? txt stop 33533
p>	2010-09-25	88299031	1/1 33533 Streaming	Info: send unlimited SMS from www.veage.com

2011/01/10 :

complaints] Response to WASPA Resolution of complaint ...

02:37:50	Delivered	Veage	and avoid expensive SMS charges. Password 77810 support 0861106472 subscriptionR7/day to stop txt stop 33433
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The Complainant wrote to WASPA on 14 December 2010 in response to the IP's correspondence and stated as follows:

"I can assure you without a shadow of doubt that neither my wife nor I have ever done what is ascribed to us. We did not click on any such website before October. After I became aware of the problems, I once looked at the Veage website to show my wife what it looks like. She confirmed to me that she never saw such website on her computer."

It appears from the above correspondence and other correspondence from the IP that the Complainant's wife was the user at the time of the alleged subscription. For the sake of clarity, I shall refer to the Complainant's wife as "the user".

Following the assignment of this complaint for formal adjudication, on 21 June 2011 I requested that WASPA obtain the following further information from the IP and the SP within 5 working days of the request:

1. A copy of the online marketing campaign materials (i.e. web pages, advertisements, banners, etc.) that Sprint Media alleges the complainant responded to in August 2010.
2. A copy of the "Blue screen" referred to in the IP's email of 24 November 2010 (it does not appear to have been included in the complaint file).
3. A copy of the WAP mobile internet landing page (in the form that it would have appeared to the complainant at the relevant time in August 2010).
4. A copy of any WAP confirmation page displayed to the complainant.

5. A detailed description of the subscription activation and subscription confirmation processes and mechanisms.
6. A statement of whether the service terms and conditions were actively "clicked" to indicate acceptance or whether the service terms and conditions were pre-populated with a tick which could have been "unclicked" to be rejected.
7. Copies of any and all welcome messages, subscription confirmation messages and monthly reminder messages sent to the complainant in log format showing MO/MT numbers, date and time of sending, delivery status and detailed message content.

The IP replied on 24 June 2011 and set out its responses to each of the questions above. In response to question 1 (a request for marketing material that the Complainant allegedly responded to), the IP only reproduced the web page already shown above, into which the user allegedly entered her number, and where she accepted terms of use. It stated that due to the Google advertising system it is very difficult to keep a track of all banners and advertisements that were active on 4 August 2010. Accordingly, I am unable to say for certain what exactly the user allegedly clicked on to reach the web landing page.

In response to the request for the blue screen referred to in original correspondence from the IP but not provided, it is not clear what screen the IP is referring to in its response. It simply states that the user might have been navigating the internet on 4 August 2010 and came across their: Web: Google Landing page: http://veage.com/SA/sms_offer/

The IP stated that the user subscribed through a web landing page, and not through WAP. It also stated that the user actively clicked in the box to agree to terms of use (as opposed to "unclicking" a pre-populated box). It provided no additional information in response to any of the other questions asked, other than information already provided (see the above extracts from the IP's initial response dated 24 November 2010). Finally, the IP confirmed that the Complainant had been refunded.

Sections of the Code considered

"11.4.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number."

"11.5.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

11.5.2. The reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

Or

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code]."

Decision

There are matters where it is difficult for an adjudicator to determine the veracity of one party's allegations over another's. This matter is such a matter. I am not in a position to determine whether or not the user actually did follow the specific steps to subscribe to the service that the IP alleges the Complainant did. However, when adjudicating on any alleged breach of the Code of Conduct that entails a disputed set of facts, where the disputed facts are not capable of clear resolution on the evidence placed before the adjudicator, the adjudicator is entitled, in appropriate circumstances, to determine whether any breach of the Code has occurred on the evidence that is put up by the respondent.

With this principle in mind, I have considered the content of the message logs adduced by the IP in this complaint. In this regard, I have noted that the welcome message sent by the IP read as follows:

"Enjoy unlimited SMS. No more expensive roaming charges www.veage.com password is: 77810. Subscription R7/day. To stop, sms stop to 33533. Support 086110647."

Section 11.4.1 states that the welcome message must be a clear notification of certain prescribed information, which includes the name of the subscription service (subparagraph (a)). The name of the subscription service in this matter is not identified in the welcome message above. Section 11.4.1 also states that the welcome message **"should not be mistaken for an advert or marketing message"**, i.e. it must be a clear notification to the consumer that it is welcoming the consumer to a named subscription service to which the consumer has already subscribed. The welcome message above could easily be mistaken for an advert or marketing message, inviting the consumer to take further action to **"enjoy unlimited SMS"** at R7 per day and to SMS "stop" to unsubscribe from further marketing communications. The IP has accordingly breached section 11.4.1 of the Code.

Section 11.5 of the Code deals with reminder messages. Section 11.5.1 and 11.5.2 state as follows:

"11.5.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter."

11.5.2. The reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

Or

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code]."

The reminder messages sent by the IP read as follows:

"Info: Send SMS from PC or cell phone www.veage.com and avoid expensive SMS charges. Password 77810. Subscription R7/day. Support 0861106472. stop? txt stop 3353"

Notably, the reminder messages sent by the IP do not begin with "**You are subscribed to...**", but state: "**Info: Send SMS from PC or cell phone...**". This could easily be misconstrued to be an communication providing information about a service that one might want to use. It reads more like an advert for a subscription service rather than a reminder of a service to which one is already currently subscribed.

The prescribed format of the reminder message in section 11.5.2 also sets out that the words "**You are subscribed to...**" should be directly followed by the cost and frequency of billing, which is not the case in the IP's messages, which put this information towards the end of the reminder message. Furthermore, in the context of the unsubscribe instruction, the IP does not use the clear wording "**To unsubscribe, ...**" as prescribed by the section, but simply writes "**stop? txt stop 3353**". The IP uses lower case lettering for the word "stop" in the instruction "**txt stop**", which is required to be in upper case by section 11.5.2. The use of the abbreviated "**txt**" is also not in compliance with the prescribed format of reminder messages in section 11.5.2.

The IP is in breach of section 11.5.2 of the Code in several respects.

While the complaint of involuntary subscription to the IP's service cannot be upheld on the available evidence, breaches of section 11.4.1 and 11.5.2 of the Code have been established on the IP's own version.

Sanctions

Given the purpose of the relevant sections of the Code that have been breached by the IP, which is to make it clear to the consumer that they have been and are *subscribed to a service* which is being *billed for* at a certain rate and at regular intervals – the non-compliance with sections 11.4.1 and 11.5.2 is significant. Even on

the IP's own version of events, it is possible that had the first reminder message been sent to the Complainant in the appropriate and specific format required by the Code of Conduct, the Complainant / user may have simply availed him or herself of the un-subscription mechanism at the first opportunity and the complaint may have been avoided.

The following sanctions are now imposed:

1. In addition to the refund already made by the IP, the IP shall further compensate the Complainant in the amount of R500.00
2. A fine of R20 000.00 is imposed on the IP.
3. All amounts to be paid by the IP shall be paid within 10 working days of the date of delivery of this report failing which:
 - 3.1 the IP shall be suspended from WASPA; and
 - 3.2 the SP, Mira Networks, and all other members shall be directed by WASPA to suspend the provision of any services to the IP;

and the suspensions contemplated in paragraphs 3.1 and 3.2 shall remain in force until such time as all amounts have been paid in full.
